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In the Supreme Court of the United States

OCTOBER TERM, 1972

72-1194

IRVING KAHN and MINNIE KAHN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To: *The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.*

The Petitioners, Irving Kahn and Minnie Kahn pray that a writ of certiorari issue to review that part of the judgment of the United States Court of Appeals for the Seventh Circuit in this cause as determined the marital privilege does not apply in this cause.

OPINION OF THE COURT BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit in *United States of America* v. *Irving Kahn and Minnie Kahn,* No. 71-1931 was entered on October 31, 1973, but is not yet officially reported. It is printed in the Appendix to this Petition. (App. 1) [1]

JURISDICTION

The judgment of the Court of Appeals was entered on October 31, 1972. A timely Petition for Rehearing was denied on January 29, 1973.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. When a husband-wife communication is intercepted by a court-authorized wire tap, may evidence thereof be admitted against them over the protest of privileges by both spouses, and in the face of the provisions of Title 18 U.S.C. § 2517(4) that "No otherwise privileged wire or oral communication intercepted . . . shall lose its privileged character."

2. Is an intercepted telephone conversation outside the marital privilege on the basis that the conversation is not the testimony of either spouse.

3. Does a husband-wife communication lose its privileged character on the basis of a charge that the conversation constitutes a crime.

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[1] "App. ....." denotes Appendix to this Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. 2517(3) and (4) provide as follows:

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

As amended Pub.L. 91—452, Title IX, § 902(b), Oct. 15, 1970, 84 Stat. 947.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this Chapter shall lose its privileged character.

Cha. 38, Sec. 155-1 Ill. Rev. Stats. provides as follows:

No person shall be disqualified as a witness in any criminal case or proceeding by reason of his interest in the event of the same, as a party or otherwise, or by reason of his having been convicted of any crime; but such interest or conviction may be shown for the purpose of affecting his credibility: Provided, however, that a defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness, and his neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect.

In all criminal cases, husband and wife may testify for or against each other; provided, that neither may testify as to any communication or admission made by either of them to the other or as to any conversation between them during coverture, except in cases where either is charged with an offense against the person

or property of the other, or in case of wife abandonment, or where the interests of their child or children are directly involved, or as to matters in which either has acted as agent of the other. 1874, March 27, R.S. 1874, p. 348, div. 13, § 6; 1937, June 30, Laws 1937, p. 502, § 1.

STATEMENT OF THE CASE.

On March 20, 1970, a Judge of the United States District Court for the Northern District of Illinois entered an order authorizing the interception of wire communications pursuant to Title 18, United States Code, Sections 2516 and 2518, based upon an application by the United States for such an order.

The order authorized interception of communications of Irving Kahn, and others as yet unknown, concerning certain offenses described in the application and order for a maximum period of 15 days. The report filed pursuant to 18 U.S.C. §2515(6) enumerated the information obtained from the Title III order.

On February 24, 1971 the Special February 1971 Grand Jury indicted Irving and Minnie Kahn for using a facility in interstate commerce to promote, manage and facilitate gambling, a violation of the laws of the State of Illinois, in violation of Title 18, United States Code, Section 1952.

The subject matter of the indictment was a telephone conversation between Irving and Minnie Kahn originated by him from to her at their residence in the Northern District of Illinois, the site of the phone authorized to be tapped.

Both petitioners filed a joint motion to suppress that the order authorizing the intrusion did not confine the interception to the communications of Irving Kahn, but extend-

ed to "and others yet unknown"; that nothing in the Affidavit is in support of any probable cause that "others yet unknown" were using, for illegal purposes, the telephone to which the order of interception was directed, and that, therefore, the authorization order was the equivalent of a "general warrant" and unconstitutional and void; that since there was no restriction on the interception from the discribed telephone facility that the interception should be conducted only when it was determined that Irving Kahn, himself, was using that phone, Title III of the Omnibus Crime Control and Safe Streets Act, standing as authority for the orders authorizing interception, was unconstitutional and void as violative of the First, Fourth, and Fifth Amendments of the Constitution of the United States. (A. 11, 12)

To these contentions the Government answered initially by reference to Section 2518(4) of Title 28, quoting as follows:

> "Each order authorizing or approving the interception of any wire or oral communitcations shall specify — (a) the identity of the person, if known, whose communications are to be intercepted;"

The Government contended that the question as to "persons yet unknown" became moot once the authorizing Judge determined that probable cause existed to intercept wire communications for a specific telephone and that the statute did not prohibit the use of intercepted conversations from those persons who are not known to the affiant prior to the authorized interception, and implied that any "incriminating evidence" by any person using the telephone set constituted evidence "certainly admissible"; (A. 30, 31). In answer to the contention that Title III as a basis for authorization of the intercepted call was violative of the First, Fourth, and Fifth Amendments, the Govern-

ment relied upon *United States* v. *Escandar,* S.D. Fla., 319 F. Supp. 295, 298 to the effect that Title III satisfies the demands of the Fourth Amendment (A. 32).

The ruling of the Trial Court as to these respective contentions is treated in Paragraph Four of the Order appealed from,[1] as follows:

> "4. *The order authorizing the interception, and the statute under which it was entered, is limited in this case to conversations participated in by the defendant Irving Kahn with persons unknown at the time the authorizing order was entered. If so limited, there is no doubt of the constitutionality of the statute or of the violation of any constitutional right of that defendant.*" (A. 51-52)

The next respective pertinent counter-contentions of the parties begins in Paragraph 6 K of the petitioners' joint motion to suppress which contended that the execution of the authorization was illegal and void in that the United States knew, or should have known, the occupants, to wit: Minnie, the wife, and their son and daughter, of the residence at 9126 Four Winds Way in Skokie, Illinois, and that they made no request for approval of the interception of any communication of the members of the household other than Irving Kahn, and yet, the communications of Minnie Kahn, Pamela Kahn, and Howard Kahn were recklessly and illegally intruded upon in contravention of Title 18, §2518(4)(a), U.S.C., and the First, Fourth, and Fifth Amendments to the Constitution of the United States. (A. 13) By her individual motion to suppress, Minnie Kahn, moving the Trial Court to suppress any and all of her

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[1] The portions of the order appealed from are italicized for identification, and easy distinction from the parties' arguments.

conversations from her residence at that address, contended that they were secured without any warrant in law. (A. 5)

To this the Government answered, incorporating the provisions of Title 18, U.S.C., §2518,(4) and contended that Minnie Kahn would fall into the class of persons designated in the permission order as "and others yet unknown."

These two contentions are resolved in the sixth paragraph of the Trial Court Order appealed from, to-wit:

> "6. *The motion of the defendant Minnie Kahn to suppress her intercepted conversations is granted, as they were not authorized by Judge Campbell's order in* 70 C 673." (A. 52)

On these issues, which are not a subject of this Petition, the Court of Appeals for the Seventh Circuit held:

> "The vital issue is whether Minnie Kahn can properly be included in the class of 'others yet unknown.' The judge, in granting the motion, had before him the government's failure to deny that it knew Minnie Kahn was an occupant of the Kahn home and accordingly would use the home phones. We agree with the judge's finding and we hold that the wiretap order did not authorize interception of Minnie Kahn's conversations as she was neither identified in the order nor was she within the class of 'others as yet unknown'." (App. 7 Infra)

A further contention on the Motion to Suppress claimed that the intrusion constitutes illegal invasions of the marital relationship between Irving Kahn and Minnie Kahn, in violation of their right to privacy under the Ninth Amendment to the Constitution of the United States, the privilege of the marital relationship established in the common law, and that the use of such communications are

barred not only by those provisions, but also by Title 18, U.S.C. §2517(4). It continued that any direct testimony by either party of the conversation and on the indictment communication, would be outlawed by law, and that the wire-tap procedure could not be utilized to obviate those constitutional, statutory, and common law provisions. (A. 14 and 15)

The Government replied that only confidential conversations between husband and wife fall within the marital relationship privilege and that the conversations between Irving and Minnie Kahn were not of a confidential nature as [they] related in part directly to the gambling operation which is the subject matter of the indictment. (A. 35)

As to these respective contentions, the Trial Court ruled as follows:

> "5. *Any conversations exclusively between the defendant Irving Kahn and his wife Minnie Kahn are privileged communications and are hereby suppressed.* 18 U.S.C. §2517(4)." (A. 52)

In reviewing and reversing this portion of the District Court decision, the Court of Appeals for the Seventh Circuit held:

> "The government contends that the judge erroneously applied the marital privilege rule because (1) Minnie Kahn was not testifying against her husband, and (2) the privilege in this proceeding must give way to the public interest in discovering the truth about crime, and in enforcement of criminal law.
>
> "We agree with the government. If the intercepted conversations had to do with the commission of a crime and not with the privacy of the Kahn marriage, the judge's ruling is erroneous." (App. 6 Infra).

No ruling nor discussion was addressed to the significance to be given Title 18 U.S.C. §2517(4).

REASONS FOR GRANTING THE WRIT

This Court should grant its writ of certiorari in this case on the following grounds:

1. In one phase of its decision, the Court of Appeals for the Seventh Circuit—refusing to recognize the existence of a Statute on which the trial court ruled—has realistically nullified the Statute.

Further, its ruling that the intervention of a third person's securing the information makes the privilege inapplicable conflicts with the express understanding of the 9th and 5th Circuits on the same subject.

The Seventh Circuit agreed with the government argument that the privilege did not apply because "Minnie Kahn was not testifying against her husband." (App. 6 infra). Yet Title 18, U.S.C., §2517(4) provides as follows:

> "4. *No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.*"

We must interpret "no otherwise privileged" to mean that but for the interference, the conversation would have been person to person. The "otherwise" refers to the interceptor. Thus, the conversation herein charged is to be considered as between husband and wife, eliminating the "otherwise" interceptor. The statute admits of no interpretation other than that, in considering the existence of the privilege, the fact of the "uninvited ear" must be discounted, or the statute loses meaning. So also would the

lawyer-client privilege; the priest-penitent privilege be appraised. No other interpretation of the statute seems appropriate or even reasonable.

Common-sense and understanding have thus interpreted the statute. See, for example *United States* v. *La Gorga*, W. D. Pa., 336 F. Supp. 190, where the supervisory agent instructed his assistants who were assigned to the monitoring duties "to turn off the interception devices immediately if a privileged conversation was taking place." 336 F. Supp. at 195.

The practical impediment to the Court of Appeals decision that the marital privilege does not apply because one spouse would not be testifying against the other, but rather the interception would be testifying is that it ignores the statutory authority under which such an officer or investigator may testify at all as to what was the content of his interception. That authority, if it exists, is found immediately preceding the preservation of the privilege and provides as follows:

> "(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any State or in any Federal or State grand jury proceeding." Title 18, U.S.C., §2517(3).

Such an officer would not be allowed to testify except under the provisions of §2517(3). Immediately succeeding the authority for his testimony is the provision for the retention of the privileged character of a communication

(2517(4)). We suggest that the Government's argument in the face of the statute has no validity in common sense. But the legislative history renders further argument superfluous.

> "Paragraph (4) provides that no otherwise privileged wire or oral communication intercepted in accordance with or in violation of the new chapter shall lose its privileged character. Traditionally, *the interest of truth in the administration of justice has been subordinated in the law to the interest of preserving privileged communications where four relationships have been involved:* physician-patient, lawyer-client, clergyman-confidant, and *husband-wife.* The scope and existence of these privileges varies from jurisdiction to jurisdiction. The proposed provision is intended to vary the existing law only to the extent it provides that *an otherwise privileged communication does not lose its privileged character because it is intercepted by a stranger.* But see *State* v. *Wallace,* 162 N.C. 622, 78 S.E. 1 (1913); *Commonwealth* v. *Wakelin,* 230 Mass. 567, 120 N.E. 209 (1918). Otherwise, it is intended to reflect existing law. See *Fed.R.Crim.Proc.* 26; *Wolfle* v. *United States,* 54 S.Ct. 279, 291 U.S. 7 (1934)." U. S. Code Congressional and Administrative News, 90th Congress Second Session 1968, Vol. 2, Page 2189. (Our Emphasis)

The practical result of this phase of the Court's ruling is repeal of 2517(4) *sub silencio.*

But, further court decisions — even in the absence of 2517(4) — have made it clear that there is a prohibition against a third person relating a statement of one spouse that prejudices the other spouse, which the spouse himself or herself, would not be allowed to relate if called as a witness. *Peck* v. *United States,* 9 Cir., 321 F.2d 934, 943; *Ivey* v. *United States,* 5 Cir., 334 F.2d 770.

2. In the other phase of the decision, the Seventh Circuit has ruled in a manner in conflict with applicable decisions of this Court, to-wit: Wolfle v. United States, 291 U.S. 7 and Blau v. United States, 340 U.S. 332, and contrary to the evidentiary laws of the State of Illinois.

The ruling of the Court below, in effect, that if the government claims the otherwise privileged communication is a violation of law, it becomes *sua sponte* non-privileged is in direct conflict with pertient decisions of this Court. In *Wolfle* v. *United States,* 291 U.S. 7, there was concerned a letter written by a husband to his wife. The description of the communication is best described by the Court itself, as follows:

> "The statement to which the witness was permitted to testify in the present case was a relevant admission by petitioner, probative of his guilty purpose or intent to commit the crime charged. It was therefore rightly received in evidence unless it should have been excluded because made in a communication to his wife." *Wolfle* v. *United States,* 291 U.S. 7, 13.

In *Blau* v. *United States,* 340 U.S. 332, the Supreme Court reaffirmed its holding in *Wolfle.* There, the wife was avoiding Government process, the question asked of the husband concerned the whereabouts of the wife. That Court held:

> "This contention ignores the rule that marital communications are presumptively confidential. Wolfle v. United States, supra, 291 U.S. at page 14, 54 S.Ct. 280; Wigmore, Evidence, §2336. The Government made no effort to overcome the presumption. In this case, moreover, the communication to petitioner was of the kind likely to be confidential. Petitioner's wife, according to the district judge, knew that she and a number

of others were 'wanted' as witnesses by the grand jury but she 'hid out, apparently so that the process * * * could not be served upon her'." *Blau* v. *U.S.*, 340 U.S. 322, 333-4.

Aside from these opposite holdings of this Court, the law regulating marital privilege is the law of the State of Illinois, generally accepted as approaching the absolute. The State statute defined in Chap. 38 §155-1 Ill. Rev. Stats. provides in pertinent part as follows:

> "In all criminal cases, husband and wife may testify for or against each other; provided that neither may testify as to any communication or admission made by either of them to the other or as to any conversation between them during coverture, except in cases where either is charged with an offense against the person or property of the other, or in case of wife abandonment, or where the interests of their child or children are directly involved, or as to matters in which either has acted as agent of the other."

None of these exceptions is applicable here.

A case directly in point was considered by the Supreme Court of Indiana in late '71. Its cogent conclusion is our submission here:

> "There are exceptions to the rule of privilege, as to communications between spouses, as, for example when the offense charged was committed by one against the other (Doolittle v. State (1884), 93 Ind. 272); and when the communication sought to be suppressed was not confidential (Beyerline v. State (1897), 147 Ind. 125, 45 N.E. 772); but the State offers no authority to support its view that the privilege can be removed by the testifying spouse, over the objection of the defendant, merely by accusing the defendant as an accom-

plice, and our independent research has disclosed none. Neither does the Moral Code of Evidence of the American Law Institute provide any such exception. (See Rules 215, 216, 217 and 231)." *Shephard* v. *State,* 277 N.E.2d 165, 167.

3. This case concerns an exceedingly serious and important question, not yet decided by this Court, of whether a search warrant issued for electronic surveillance under the Fourth Amendment can invade and destroy the husband-wife relationship and privilege.

CONCLUSION

Wherefore, for the above and foregoing reasons, it is respectfully prayed that this Court will issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review its decision so far as said decision interprets the marital privilege.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 71-1931 SEPTEMBER TERM, 1971 — APRIL SESSION, 1972

UNITED STATES OF AMERICA,

Plaintiff-Appellant.

vs.

IRVING KAHN and MINNIE KAHN,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 71-CR-174 — THOMAS R. McMILLEN, *Judge.*

ARGUED JUNE 1, 1972 — DECIDED OCTOBER 31, 1972

Before KNOCH, *Senior Circuit Judge,* KILEY and STEVENS, *Circuit Judges.*

KILEY, *Circuit Judge.* The government has appealed[1] from an order of a district judge suppressing as evidence conversations between Irving and Minnie Kahn, husband and wife, gathered from wiretaps authorized by a district judge's order permitting interception of their telephone communications by virtue of the provisions of Title III

[1] 18 U.S.C. §3731, 18 U.S.C. §2518(10)(b).

of the Omnibus Crime Control and Safe Streets Act of 1968.[2] We affirm in part and reverse in part.

On March 20, 1970 the judge issued the wiretap order on application of the government, through a specially designated Assistant Attorney General, supported by an FBI agent's affidavit.[3] The order authorized interception of Irving Kahn's conversations with "others as yet unknown" using the two Kahn home telephone numbers. Minnie Kahn was not named in the order. The government presumed the order authorized interception of her conversations as a member of the class of "others as yet unknown." The judge accepted the FBI status report he required under authority of §2518(6) of the Act[4] and presumably approved the government's interpretation of the order.

The order cautioned that execution of the order should be as "soon as practicable" and "in such a way as to minimize the interception of communications not otherwise subject to interception under Chapter 119 of Title 18, United States Code,[5] and must terminate upon attainment of the authorized objective or, in any event, at the end of fifteen (15) days from the date of this order." On March 25, 1970 the government reported the interception had been

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[2] 18 U.S.C. §§2516 and 2518.

On the basis of the same affidavit supporting the eavesdrop order, the district judge the same day authorized use of a Pen Register. No question is raised in the appeal with respect to the Pen Register.

[3] 18 U.S.C. §§2516 and 2518.

[4] (6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

[5] 18 U.S.C. §§2510-2520.

terminated by attainment of the objective. The report[6] stated the objective was attained by gathering information, *inter alia,* that on March 21, 1970 Irving Kahn called his wife from Arizona and discussed gambling wins and losses, and that the same day Minnie Kahn called a known gambling figure twice and discussed numbers and amounts of bets placed and the identity of the bettors by numbers.

On February 24, 1971 Irving and Minnie Kahn were indicted for using a telephone "facility in interstate commerce" with intent to promote gambling in violation of Illinois law. On April 27, 1971 the Kahns filed motions to suppress the wiretap evidence pursuant to 18 U.S.C. §2518(10)(a).[7] The joint motion asserted that the Kahns'

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[6] On March 10, 1971 an order was entered authorizing the FBI, in possession of tapes from the eavesdropping, to break the seal, make copies of recordings and supply the defendants' counsel with a copy.

[7] (10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that —

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

Fourth and Fifth Amendment rights were violated by the wiretaps. It also challenged the sufficiency of the application for the order, the necessity for the order and the FBI use of telephone company records allegedly in violation of 47 U.S.C. §605 and 18 U.S.C. §2515, the duration of the order, and its excessive breadth. The Kahns also challenged the order for its lack of directions for minimizing interception, and alleged that it violated the marital privilege under the Ninth Amendment, the common law and 18 U.S.C. §2517(4).[8]

The judge[9] found that the Attorney General's application for the intercepting order was adequately supported by the FBI agent's affidavit and that the order was valid and enforceable under 18 U.S.C. §2518(3-5).[10] The judge

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[8] (4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

[9] The criminal case was assigned to a district court judge other than the judge who authorized the wiretap.

[10] (3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that —

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are

further found that the statute authorizing the wiretap order was "undoubtedly" constitutional when limited to conversations participated in by "Irving Kahn with per-

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(Footnote 10 continued)

to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify —

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

sons unknown at the time." However, the judge, without hearing testimony, suppressed any conversations "exclusively" between Irving and Minnie Kahn as being within the marital privilege doctrine as applied through 18 U.S.C. §2517(4). The judge also decided that the wiretap order did not authorize interception of Minnie Kahn's conversations. The government's appeal followed.

I.

The government contends that the judge erroneously applied the marital privilege rule because (1) Minnie Kahn was not testifying against her husband, and (2) the privilege in this proceeding must give way to the public interest in discovering the truth about crime, and in enforcement of criminal law.

We agree with the government. If the intercepted conversations had to do with the commission of a crime and not with the privacy of the Kahn marriage, the judge's ruling is erroneous. Society has an interest in protecting the privacy of marriage because invasion of the privacy endangers the family relationship. The privilege has been interpreted in some jurisdictions to exclude conversations between spouses about business, since their role as spouses is merely incidental.[11] That rule reinforces the exception to the privilege; "[w]here both spouses are substantial participants in patently illegal activity, even the most expansive of the marriage privileges should not prevent testimony."[12]

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[11] Annot., 4 A.L.R. 2d 835.

[12] Note, *Future Crime or Tort Exception to Communications Privilege*, 77 HARV. L. REV. 730, 734 (1964).

This court recently, in *United States* v. *Doughty,* 460 F.2d 1360, 1364 (7th Cir. 1972), said:

> The Doughtys were in the unlawful enterprise together, and we think it highly unlikely that the court's admission of the testimony [of an agent] . . . militated against their domestic peace or offended the public interest which the rule in *Hawkins* [358 U.S. 74 (1958)] sought to protect.

That language reflects Exception (2)(e) of UNIFORM RULE OF EVIDENCE 28; see also *United States* v. *Pugliese,* 153 F.2d 497, 500 (2nd Cir. 1945).[13] We realize that "the law of evidence has demonstrated a degree of solicitude toward the intimacy of marriage not manifested with regard to other protected relationships."[14] but the conversations before us between the Kahns were with respect to ongoing violations of Illinois gambling laws. We hold therefore that the judge erred in suppressing those conversations.

The cases cited by the Kahns do not aid them. The point here was not raised in *Wolf* v. *United States,* 291 U.S. 7 (1934), and there was no evidence in that case of dual participation in crime. In *Blau* v. *United States,* 340 U.S. 332 (1951), the husband refused to disclose the whereabouts of his wife, sought as a grand jury witness, who secretly entrusted her address to him. The privileged communication was not in furtherance of a crime. The decision in *Ivey* v. *United States,* 344 F.2d 770 (5th Cir. 1965), is also distinguishable, since the objectionable tes-

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[13] It is noteworthy also that the attorney-client privilege may not be invoked where commission of a crime is involved. See *United States* v. *Hoffa,* 349 F.2d 20, 37 (6th Cir. 1965), *aff'd* 385 U.S. 293 (1966).

[14] 77 HARV. L. REV. at 734.

timony of Mrs. Ivey did not deal with the furtherance of a crime, but was an admission of a past crime. In *Peek* v. *United States,* 321 F.2d 934 (9th Cir. 1963), the court found no abuse of discretion in the trial court's denying a pre-trial motion for severance which urged the possibility that the government would use statements in violation of the marital privilege—the district court had deferred ruling to the actuality of the trial. In the case before us the judge used his discretion to rule before trial. No claim is made that the ruling was an abuse of discretion.

II.

In the motion to suppress the Kahns alleged that the affidavit supporting the eavesdrop order "nowhere states facts" showing probable use of the Kahn telephones for illegal purposes by "others as yet unknown;" that the government "knew, or should have known," the occupants of the Kahn home and made no request for permission to intercept conversations other than those of Irving Kahn; and that the conversations of Minnie Kahn were "recklessly and illegally" intercepted. The government's answer to the motion asserted that Minnie Kahn fell into the class of "others as yet unknown." The judge suppressed the conversations.

The vital issue is whether Minnie Kahn can properly be included in the class of "others as yet unknown." The judge, in granting the motion, had before him the government's failure to deny that it knew Minnie Kahn was an occupant of the Kahn home and accordingly would use the home phones. We agree with the judge's finding and we hold that the wiretap order did not authorize interception of Minnie Kahn's conversations as she was neither identified in the order nor was she within the class of "others as yet unknown."

Section 2518(1)(b)(iv) of the Act requires the government to identify, in an application, any person, "if known," whose communications are to be intercepted. The implication is that if not known, such a person's conversations may be intercepted if that person's probable complicity in the offenses being committed is not yet known. The wiretap order was limited to conversations of "Irving Kahn and others as yet unknown." Thus in order to satisfy the limitations of the judge's order the wiretap had to meet two requirements: 1) that Irving Kahn be a party to the conversations, and 2) that his conversations intercepted be with "others as yet unknown."

The issue before us rests upon the scope of the term "others as yet unknown." A narrow construction of the term would limit the meaning of "others as yet unknown" literally to persons whom the government did not know. Under this construction Minnie Kahn would be excluded from the reach of the interception order, since she was admittedly known to the government as Irving's wife. A second construction would confine the term "others as yet unknown" to *those persons whom the government did not know were engaging in illegal conversations with Irving Kahn.* The first construction of "unknown" refers to the *identity* of the person; the second construction refers to the *illegal activities* of the person. Under the second construction, even if the government knew a person it might still not "know" of that person's probable illegal activities. If Minnie Kahn, although known to the government, was not known to be a likely user of the Kahn telephones for illegal activities, she would be "unknown" under the second construction.

No facts were stated in the application and affidavit in support of the authority to wiretap the conversations of

"others as yet unknown." The government argues that that is unimportant and that it is enough that the order permits interception of conversations concerning crime to be continued until the manner of Irving Kahn's participation and that of his confederates in the crime be revealed and until the confederates are identified and the place of operation and the nature of the conspiracy are revealed. It contends that the order need not require Irving Kahn's confederates be in conversations only with him and that all conversations about gambling on the subject phones may be intercepted.

Congress, in order to "safeguard the privacy of innocent persons," found that interception should be disallowed where none of the parties had consented to the wiretap and where it is not authorized by a proper court order.[15] It stated that the purpose of Title III was twofold: protection of personal privacy, and "delineating on a uniform basis" the circumstances and conditions under which wiretapping may be authorized.[16] We think that it is necessary therefore to limit the class of "others as yet unknown" as tightly, in the interest of personal privacy, as the competing need for reasonable public protection in law enforcement permits. In our opinion Congress did not intend that the implication in the term "if known" should be extended to embrace persons whom careful investigation by the government would disclose were probably using the Kahn telephones in conversations for il-

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[15] Omnibus Crime Control and Safe Streets Act of 1968, §801(b), Title III, 82 Stat. 197; S. Rep. No. 1097, 90th Cong., 2nd Sess., U. S. Code Cong. & Ad. News 2112, 2153.

[16] Omnibus Crime Control and Safe Streets Act of 1968, §801(d), Title III, 82 Stat. 197.

legal activities. We conclude that in the interest of protecting personal privacy a broader construction of the term "others as yet unknown" is required, *i.e.*, if the government did not know but should have known by prudent investigation of the likelihood of Minnie Kahn's use of the telephones for illicit activities, she was not a person "unknown."

It is not in the public interest to relax concern of individual privacy to accommodate less than careful performance on the part of government agents. It is far more important, in our opinion, to protect Minnie Kahn's personal privacy than it is to permit the government to avail itself of fruits of its less than careful intrusion upon her privacy in order to prosecute her for the offense.[17]

The application of the Assistant Attorney General merely sought authority to wiretap the conversations of "others as yet unknown" on the basis of the agent's affidavit. The affidavit did no more than indicate that the wiretap of conversations of "others as yet unknown" would be useful. The agent's affidavit contains long lists taken from telephone company records of interstate telephone calls using the Kahn phones to discuss gambling. The sources which led to these lists were gamblers who had worked with or engaged in gambling enterprises with Irving Kahn. It is highly improbable that all of these communications were with Irving Kahn. The sources which led to these lists would also seem likely sources from which questioning would elicit information identify-

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[17] "What is truly central to the fourth amendment, as Justice Bradley stated in his historic opinion in *Boyd* v. *United States* [116 U.S. 616 (1886)] is 'the sanctity of a man's home and the privacies of life'." Spitzer, *Electronic Surveillance by Leave of the Magistrate: The Case in Opposition*, 118 U. OF PA. L. REV. 169, 180 (1969).

ing members of the Kahn household other than Irving Kahn who used the telephones in aid of the unlawful enterprise. And if the attempt to elicit that information was unsuccessful, we fail to see why the agent could not state the reason for lack of success, and the interception order find that "normal" investigative procedures have been tried and have failed.[18] The conclusionary statement in the application and affidavit that "normal investigative methods reasonably appear to be unlikely to succeed and are too dangerous to be used" is too slender a reed upon which to rest the invasion of Minnie Kahn's privacy. And the government was precluded from augmenting the application and affiidavit at a suppression hearing. *United States* v. *Roth,* 391 F.2d 507, 509 (7th Cir. 1967).

We think the government's wiretap impinged upon Minnie Kahn's privacy and accordingly the government had the burden, at the suppression hearing, of justification. We find no justification in the record for not determining from the informants used for the government's application and affidavit whether Minnie Kahn had received or sent, through the particular telephone numbers, communications with respect to unlawful gambling activities; and the government has not shown that had it conducted its investigation with the care Congress intended, to protect personal privacy, it would not have discovered whether or not Minnie Kahn had implicated herself by her conversations. Where, as here, the government's application and affidavit disclosed sources from which it could probably have learned the likelihood that Minnie

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[18] 18 U.S.C. §2518(3)(c): "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;"

Kahn was using the Kahn phones in illicit activity, but neither made the attempt, nor stated facts justifying not attempting, to gain that knowledge, the subsequent wiretaps amounted to a virtual general warrant in violation of her Fourth Amendment right.[19] We conclude that the application and affidavit do not support an interpretation of the interception order to include Minnie Kahn in the class of "others as yet unknown" and that the district judge did not err in deciding that the order did not authorize the wiretapping of her telephone conversations.

It might be questioned whether conversations of Minnie Kahn could be lawfully seized had the government after proper investigation determined that no other persons in the household—other than Irving Kahn—had used the phones in committing crimes, and intercepted Irving Kahn's conversations only to find Minnie Kahn discussing with him an illegal enterprise. The suppositious question presupposes no prior knowledge of any unlawful activity by Minnie Kahn and no basis on which to include her in the application and affidavit class of "others as yet unknown" who had in the past used or were presently using the phones for conversations regarding the offense. The question is not revelant to the question before us. However, we think the evidence seized in such an event might be used in the prosecution of Irving Kahn, but not against Minnie Kahn. There is a distinction between the event supposed in this question and the question arising where, for example, a valid tap on a named person concerning a particular offense uncovers evidence against another person of a different offense. *United States* v. *Cox*, 449 F.2d 679 (10th Cir. 1971).

The government relies upon language in *Berger* v. *New York*, 388 U.S. 41, 55 (1967). *Berger* is of no aid to the

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[19] *Spitzer, supra*, n. 17, at 191.

government in view of our conclusion that the government has not shown why it could not have identified Minnie Kahn in its application and affidavit. Neither does *United States* v. *Cox, supra,* aid the government. There the order specified narcotics violation, and conversations about bank robbery were monitored . The court found no constitutional error in the use of the conversations at the bank robbery trial.

Furthermore, the government analogizes the Kahn situation to the discussion in *Alderman* v. *United States,* 394 U.S. 165, 177 n.10 (1969), where the Court approved seizure and use of narcotics in a proper warrant specifying gambling material. There the narcotics were contraband. In *United States* v. *Sklaroff,* 323 F. Supp. 296, 325 (S.D. Fla. 1971), a district judge decided that "if a lawful court order . . . [as to a] named person[s] is issued, and . . . conversations [of] . . . other persons not named . . . are *lawfully* intercepted" (emphasis added), the seized conversations may be used. This decision was followed in *United States* v. *Perillo,* 333 F. Supp. 914, 919-921 (D. Del. 1971). The word "lawful" in the language quoted begs the question before us.

The judgment is reversed in so far as it is based upon the marital privilege ground, and is affirmed in so far as it decided that the wiretap order did not authorize the interception of Minnie Kahn's conversations.

KNOCH, *Senior Circuit Judge* concurring in part and dissenting in part. I am in complete accord with Judge Kiley's well reasoned views concerning the interception of Minnie Kahn's telephone conversations with others than Irving Kahn, but I must respectfully dissent from his conclusion that the marital privilege does not apply to their conversations with each other. As counsel for the

Kahns argued persuasively before this Court, an attorney-client relationship may be effectively destroyed once the two become fellow criminals, but husband and wife remain husband and wife even though they embark on a joint criminal venture. I would affirm the decision of the District Judge.

STEVENS, *Circuit Judge,* concurring in part and dissenting in part: The government's appeal from Judge McMillen's suppression order requires us to construe (a) an earlier order entered by Judge Campbell authorizing the telephone intercepts and (b) the statutory requirement that such an order specify the identity of the persons, "if known," whose conversations are to be intercepted. I agree with Judge Kiley that conversations between Minnie and her husband in aid of their criminal enterprise were not privileged. I believe, however, that Judge Campbell's order of March 20, 1970, authorized the agents to listen to conversations in which Irving did not participate, and that the failure to name Minnie in the order is not an appropriate ground for suppressing her conversations.

A. *The Order.*

On March 20, 1970, the government applied to Judge Campbell for an order authorizing the interception of conversations using two telephones identified by number and by location in Irving Kahn's residence. One purpose of the request was to intercept communications which would reveal the identity of Irving Kahn's confederates.[1]

The request was supported by a detailed 18-page affidavit summarizing the results of a thorough investigation

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[1] Affidavit of Douglas P. Roller, p. 4.

leading to the conclusion that Irving Kahn's two telephones were being used in an illegal gambling enterprise, and that Irving Kahn was a principal in the venture. Based on that showing, Judge Campbell found probable cause to believe that Irving Kahn "and others as yet unknown" have committed and are committing the specified offenses, and that the two designated telephones "have been and are being used by Irving Kahn and others as yet unknown in connection with the commission of the above described offenses." It should be noted that he did not find merely that the telephone numbers were being used illegally, but rather that the two telephones in Irving's residence were being so used by "others as yet unknown" as well as by Irving. Although the record support for Judge Campbell's findings has been suppressed, it was available to Judge McMillen, who entered the suppression order, as well as to this court. No judge who has reviewed that record has expressed any doubt that Judge Campbell's findings were fully supported by the record.

Having made the findings required by the statute, Judge Campbell authorized the interception of communications over Irving Kahn's two telephones. The scope of the authorization granted by Judge Campbell's order was to "intercept wire communications of Irving Kahn and others as yet unknown concerning the above-described offenses to and from two telephones, subscribed to by Irving Kahn, both located at 9126 Four Winds Way, Skokie, Illinois, a private residence, and carrying telephone numbers 675-9125 and 675-9126, respectively."

If we consider the language used by Judge Campbell in his findings and in his order, it is clear that the intercept authority was not limited to conversations to which Irving Kahn was a party. If that had been Judge Campbell's purpose, there would have been no need to refer

to the illegal use of the two telephones in Kahn's residence, not only by Kahn himself, but also by "others as yet unknown." The authorization in the order does not describe communications *between* Irving Kahn and others; rather it describes "conversations *of* Irving Kahn and others as yet unknown" using the two telephones in his residence. If only the conversations of Irving were involved, the findings and the order are replete with redundancies.

My reading of the statement of purpose in the government's application, Judge Campbell's findings, and the language of the order itself does not permit me to accept an interpretation which limits the scope of the intercept authority to conversations to which Irving Kahn was a party.

B. *The Statute.*

There are two separate reasons why I believe the majority misreads the statute: (1) in my opinion the record does not support the conclusion that Minnie Kahn's participation in the gambling enterprise was "known" to the government on March 20, 1970, within the meaning of § 2518(4)(a); and (2) the adequacy of the government's investigation prior to March 20, 1970, is not relevant to the "if known" issue arising under § 2518(4)(a), but rather pertains to a question which was resolved by a finding of fact entered in compliance with § 2518(3)(c).

1. *Section 2518(4)(a).*

This section provides:

> "(4) Each order authorizing or approving the interception of any wire or oral communication shall specify —
>
> "(a) the identity of the person, if known, whose communications are to be intercepted; . . ."

82 Stat. 219, 18 U.S.C. § 2518(4)(a).

Just as a search warrant must carefully limit the discretion of the officer executing the warrant by defining the scope of his authority to search and the objects to be seized, this subsection was intended to require the order to define the scope of the agent's authority to intercept conversations.[2] The inclusion of the words "if known" indicates that Congress intended to permit the interception of some conversations of persons whose participation in the criminal activity was unknown at the time the order was entered. As I read the record, Minnie Kahn was such a person on March 20, 1970.

The court does not hold that the record supports the conclusion that Minnie Kahn was a person who was actually "known" to be participating in the conversations sought to be seized. On the contrary, the court treats the statutory words "if known" as if Congress had used language broad enough "to embrace persons whom careful investigation by the government would disclose were probably using the Kahn telephones in conversations for illegal activities." In my opinion we should adhere to the language which Congress actually used rather than adopt what we might consider to be a more desirable requirement.

The extent of the government's knowledge should, I believe, be appraised as of the time it requested an intercept order. Just as evidence obtained by means of a search may not be used retroactively to establish probable cause for the issuance of a warrant defective on its face, it seems equally clear that our present knowledge of Minnie Kahn's guilt may not be imputed to the agents who had not yet intercepted her conversations. If we put

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[2] At least that is a fair inference to be drawn from the language of the section and the explanatory reference in the Senate Committee Report to *West* v. *Cavell*, 158 U.S. 78, see especially 87-88; U. S. Code Cong. & Ad. News, 90th Cong., 2d Sess. 2191 (1968).

the seized evidence to one side, there is nothing in the record to support an inference that the government should have known that Minnie Kahn, instead of Pamela Kahn, Howard Kahn, or possibly some regular visitor, would use Irving's telephones to transmit gambling information to a third party while he was out of town.

As Judge Kiley points out, it is entirely possible that one of the anonymous informants referred to in the affidavit supporting the government's application for intercept authority might have known that Minnie made illegal telephone calls and might have given that information to a government investigator; on the other hand, it is also possible that she made such calls only on rare occasions when Irving was out of town, or that informants willing to describe Irving might not have been willing to mention Minnie. The whole inquiry, in my opinion, is a matter of speculation and is neither necessary nor appropriate to the determination of whether the order meets the "if known" requirement of § 2518(4)(a).

2. *Section 2518(3)(c).*

The statute authorizes the judge to enter an intercept order if he makes certain determinations on the basis of the government's factual showing. Among others, he must determine that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." 82 Stat. 219, 18 U.S.C. § 2518(3)(c).

Judge Campbell made an express finding of fact complying with this requirement. The finding is supported by a detailed description of the "normal investigative procedures" which had been used, and by a perfectly reasonable explanation of why "the interception of these telephone communications is the only available method of investigation which has a reasonable likelihood of secur-

ing the evidence necessary to prove violations of these statutes.'"[3] Although the results of the investigation plainly indicated that Irving Kahn's telephones were being used in connection with the commission of an offense, the record also supports the conclusion that it was unlikely that admissible evidence would be available to prove Kahn's guilt unless intercept authority was obtained. Nothing in the record suggests that a further investigation which might have ascertained Minnie's participation would have obviated the need for such authority. In short, the finding required by § 2518(3)(c) was made and, in my opinion, is supported by the record.

Although § 2518(3)(c) imposes a duty on the government to exhaust normal investigative procedures before applying for an intercept order, it seems unlikely that the "if known" requirement in § 2518(4)(a) was intended to impose either an additional exhaustion requirement or a more severe standard for measuring the government's compliance with the express language of subsection (3) (c). I am therefore persuaded that the majority's interpretation of the "if known" requirement will merely tend to confuse two quite different statutory purposes.

In sum, in my opinion the court's decision is predicated on an improper reading of Judge Campbell's order of March 20, 1970, and an incorrect interpretation of the statute. In view of the majority's disposition of the case, comment on constitutional issues is inappropriate.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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[3] Affidavit of Ray I. Shryock, p. 16.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

January 29, 1973

Before

HON. WIN G. KNOCH, *Sr. Circuit Judge*
HON. ROGER J. KILEY, *Sr. Circuit Judge*
HON. JOHN PAUL STEVENS, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

No. 71-1931 vs.

IRVING KAHN and MINNIE KAHN,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 71-CR-174

On consideration of the petitions for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and a majority of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petitions for a rehearing in the above-entitled cause be and the same are hereby denied.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1194

IRVING KAHN AND MINNIE KAHN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners argue that interstate telephone conversations between husband and wife in which illegal gambling business was discussed, intercepted pursuant to court orders, should be suppressed under the "marital privilege."

On application of the government, the United States District Court for the Northern District of Illinois entered an order on March 20, 1970, authorizing the interception of telephone communications of "Irving Kahn and others as yet unknown" concerning certain gambling offenses in violation of 18 U.S.C. 1952. The order authorized the interception of telephone communications over the telephone located in the Kahn residence in Chicago. One of the calls which was intercepted pursuant to this court order was a telephone call from

Irving Kahn in Arizona to his wife, Minnie Kahn, at the residence phone in Chicago. In this interstate conversation, they discussed gambling wins and losses. Subsequently, Mrs. Kahn made two calls to a known gambling figure and discussed numbers and amounts of bets and identities of bettors (Pet. App. 2-3).

Petitioners were subsequently indicted for violation of 18 U.S.C. 1952. When the government indicated that it intended to use evidence obtained from a court ordered wiretap, petitioners moved to suppress. The district court thereupon ordered that evidence of telephone conversations between Irving Kahn and his wife should be suppressed under the "marital privilege." The court further ordered that all conversations not involving Irving Kahn as one of the parties should be suppressed as outside the scope of the court authorization (G. App. 23a).[1] On appeal by the government, a divided court of appeals reversed the decision of the district court on the marital privilege, but ruled that all conversations not between Irving Kahn and a person unknown must be suppressed. The court of appeals further found that Minnie Kahn was not a person unknown within the meaning of the court order because the government had not shown that further pre-intercept investigation would not have revealed her complicity (Pet. App. 8-14). Both the government and petitioners sought a rehearing in the court of appeals which was denied on January 29, 1973 (Pet. App. 21).

The government has petitioned this Court for a writ of certiorari to review that part of the court of appeals

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[1] "G. App." refers to the government's appendix filed with our petition for a writ of certiorari to review the other aspect of the court of appeals decision in this case (No. 72-1328).

decision upholding the suppression (No. 72-1328). Petitioners here seek review of that part of the court of appeals decision holding that the marital privilege was not applicable to the conversations sought to be suppressed.

1. There is no merit to petitioners' claim that evidence of their interstate gambling conversation should be suppressed under the marital privilege doctrine. In a federal trial, the admission of evidence, and competency and privileges of witnesses, is governed by principles of common law as interpreted by the federal courts in light of reason and experience. Rule 26, Fed. R. Crim. P.; *Hawkins* v. *United States,* 358 U.S. 74, 77.[2] There are two different evidentiary privileges arising from the marital relationship: the privilege excluding the testimony of one spouse against the other, and the immunity of confidential communications between husband and wife. *Wolfle* v. *United States,* 291 U.S. 7, 14; VIII Wigmore, *Evidence* (McNaughton rev. 1961) §§ 2333-2334. Neither aspect of the privilege is applicable in this case.

That aspect of the privilege which prevents one spouse from testifying against the other is based on the principle of promoting marital peace and harmony. *Hawkins* v. *United States, supra,* 358 U.S. at 77-78. Since disclosure of the intercepted conversation here is neither directly nor indirectly testimony by the spouse affecting the harmony of the marital relationship, the court of appeals correctly

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[2] The Illinois marital privilege statute cited by petitioners (Pet. 13) is therefore inapplicable.

found this aspect of the privilege not applicable (Pet. App. 6-8).[3]

There is also no merit to petitioners' claim that the communication itself was privileged, and hence, could not be disclosed at trial. Communications that promote a crime are not covered by the second branch of the marital privilege. Under 18 U.S.C. 2517(4) an *otherwise* privileged communication does not lose its privileged character as a result of court-authorized, surreptitious electronic interception and therefore could not be disclosed at trial. But this provision has no applicability if, as here, the communication, absent the interception, would not have been privileged under the common law rules as interpreted by the federal courts. See S. Rep. No. 1097, 90th Cong., 2d Sess. at 100.[4] Conversations, such as those between Irving and Minnie Kahn here,

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[3] There is some conflict whether testimonial statements by one spouse to a third party may be used in evidence when presented by the third party to whom they were made. The exclusion of such statements was adopted as the rule in *Ivey* v. *United States*, 344 F. 2d 770 (C.A. 5); cf. *Peek* v. *United States*, 321 F. 2d 934 (C.A. 9) (dicta); *United States* v. *Winfree*, 170 F. Supp. 659 (E.D. Pa.). The opposite view, that such declarations by one spouse may be testified to by a third party since this does not contravene the purpose of the rule, has been adopted in *United States* v. *Doughty*, 460 F. 2d 1360, 1364 (C.A. 7) and *United States* v. *Mackiewicz*, 401 F. 2d 219 (C.A. 2). See also *United States* v. *Pugliese*, 153 F. 2d 497, 500 (C.A. 2). This question is not raised here, however, since there was no knowing disclosure by either spouse which could affect the family harmony.

[4] This provision is similar to the provision in §5.11(b) of the A.B.A. Standards on Electronic Surveillance. The commentary to this section notes that some jurisdictions provide that any access to the communication by a third party, even as an eavesdropper, destroys the privilege, and that the integrity of various confidential relationships would be undermined if electronic eavesdropping on the conversation had this effect. The standard, therefore, specifi-

made in furtherance of a criminal activity, are not so privileged.[5] The basis of the privilege is the protection of marital confidence regarded as essential to the marriage relationship. See *United States* v. *Wolfle*, *supra*, 291 U.S. at 14. As this Court said (*ibid.*):

> Communications between the spouses, privately made, are generally assumed to have been intended to be confidential and hence they are privileged; but wherever a communication, because of its nature or the circumstances under which it was made, was obviously not intended to be confidential it is not a privileged communication.

In this case, the court below found that the intercepted conversation was made on the basis of the relationship between Irving and Minnie Kahn in the conduct of their illegal gambling business, not on the basis of a marital relationship. Therefore, although as partners in an illegal enterprise they undoubtedly intended their conversation to be "confidential", the nature of the conversation shows that it involved no marital confidences and was thus not the kind of communication to which the law accords privileged status.[6] The provision of 18 U.S.C.

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cally abrogates this rule. The commentary also notes, however, that criminal conversations, as in this case, not being otherwise privileged, would not be affected. See A.B.A. Project on Minimum Standards for Criminal Justice, Standards Relating to Electronic Surveillance, Approved Draft, pp. 152-158 (March 1971).

[5] Similarly, this Court has recognized the inapplicability of the attorney-client privilege to protect communications made in furtherance of a crime. *Clark* v. *United States*, 289 U.S. 1, 15, as well as the inapplicability of the juror-secrecy privilege in a case of jury fraud, *id.* at 16.

[6] Neither *Wolfle* v. *United States*, *supra*, 291 U.S. 7, nor *Blau* v. *United States*, 340 U.S. 332, cited by petitioners (Pet. 12), indi-

2517(4) therefore, is inapplicable and the conversation was properly held admissible in evidence.*

2. The conversation between Irving and Minnie Kahn in this case was not only in furtherance of their illegal gambling business, but was itself an offense under 18 U.S.C. 1952. Under the rule which petitioners have urged this Court to adopt, spouses could commit this offense with impunity, because the conversation could never be disclosed and neither spouse could testify to it. Such a result would promote neither the legitimate interests of the marital relationship nor the societal interest in preventing crime.

Therefore, irrespective of the action the Court takes in connection with the government's pending petition for review of other questions in this case, the instant petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1973.

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cates otherwise. In *Wolfle*, the Court decided that the letter from husband to wife was not intended to be confidential because it was dictated to a secretary. *Blau* involved a husband's "refusal to betray his wife's trust" (340 U.S. at 334) in confiding her whereabouts to him while she was attempting to avoid testifying before a grand jury. Therefore, the application of the privilege protected a marital confidence. Moreover, as the court below noted, neither case involved communications in furtherance of on-going criminal activity (Pet. App. 7).

* This conversation would also be admissible under Rule 505 of the Proposed Federal Rules of Evidence, which would eliminate the privilege for the communication and limit the privilege only to preventing testimony by a spouse. A similar result would also be reached under Rule 28(2)(e), Uniform Rules of Evidence, under which conversations relating to crimes are expressly made admissible. See, also, Rules 214-218, ALI Model Code of Evidence (1942); Note, *The Future Crime or Tort Exception to Communications Privileges*, 77 Harv. L. Rev. 730, 734 (1964).